LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 7 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 686.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation, and ASHLO COAL COMPANY, a corporation,

Respondents.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d/b/a Elkhorn Coal Company,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JAMES S. GREENE, JR.,
Harlan, Kentucky,

LOGAN E. PATTERSON,
Pineville, Kentucky,

Counsel for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

TABLE OF CONTENTS.

Question Presented 2

Statement of the Case 2

The Argument 6

Conclusion 13

TABLE OF AUTHORITIES.

Cases.

Costa vs. Chapkines, 316 F. 2d 541 8

Klapprott vs. United States, 335 U. S. 601 ..... 6, 7

L. M. Leathers' Sons vs. Goldman, 252 F. 2d 188 ..... 8, 9

Price, et al., vs. United Mine Workers of America, 336 F. 2d 771 3

Radack vs. Norwegian American Line Agency, Inc., 318 F. 2d 538 8

Sunfire Coal Company, et al., vs. United Mine Workers of America, 313 F. 2d 108 3

Sunfire Coal Company, et al., vs. United Mine Workers of America, 335 F. 2d 958 3

United States vs. Karahalias, 205 F. 2d 331 7

Texts.

Barron & Holtzoff, Volume 3, Federal Practice and Procedure, page 421 12

Moore's Federal Practice, Volume 7, page 321 12

Federal Rules of Civil Procedure.

Rule 50 2

Rule 60(b) 2, 3, 6, 8, 9

Rule 77(d) 8

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 686.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation, and ASHLO COAL COMPANY, a corporation,

Respondents.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d/b/a Elkhorn Coal Company,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associat Justices of the Supreme Court of the United States:

Respondents Sunfire Coal Company and Ashlo Coal Company, and R. P. Price, C. H. Kelly and Follace Fields, Partners, d/b/a Elkhorn Coal Company, in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTION PRESENTED.

Where a litigant seeking a new trial, solely on the basis of newly discovered evidence and admittedly more than one year after the entry of judgment, contends that the one-year limitation provided in Rule 60(b) of the Federal Rules of Civil Procedure is made inapplicable because (1) the evidence was not discovered within a year and (2) was of such secret nature that ready revelation would not be expected, and the trial court overrules such motion on the ground that the one-year limitation is applicable, is this ruling in error, and if so, is it an error of such "special and important" character as to justify the granting of certiorari under Rule 19 of this Court?

STATEMENT OF THE CASE.

To correct what they consider inaccuracies and omissions in the petitioner's statement of the case, respondents point out:

(1)

On page 5 of the Petition for Writ of Certiorari, the petitioner asserts, and thereafter assumes as a fact, that the evidence of lawlessness and violence produced upon the trials of these cases completely failed to connect those acts with the petitioner.

It is felt that both the assertion and the assumption are unjustified. It is also considered by respondents to be sufficient, at this point, to call attention to the fact that in both cases juries thought the evidence sufficient to connect the petitioner with the acts. In each case the trial court (different judges) thought the evidence sufficient to show a connection, and the issue was submitted to a jury. In each case the presiding trial judge overruled motion (pursuant to Rule 50, F. R. C. P.) for judgment and al-

ternative motion for a new trial, which motions asserted this same alleged insufficiency of the evidence. In both cases the Court of Appeals thought there was sufficient evidence to justify submission to a jury, and so declared. (*Sunfire Coal Company, et al., vs. United Mine Workers of America*, 313 F. 2d 108, 110; *R. P. Price, et al., vs. United Mine Workers of America*, 336 F. 2d 771, 776; and re-affirmed in both, *Sunfire Coal Company, et al., vs. United Mine Workers of America*, 335 F. 2d 958, 962.) In the *Sunfire* case this same contention was urged upon this Court in a Petition for Writ of Certiorari on the merits, which was denied (375 U. S. 924). It was again urged upon this Court in another Petition for Writ of Certiorari (pursuant to this Court's Rule 20) specifically presenting to the Court the precise relief which is sought in this petition and with substantially the same argument (375 U. S. 924).

As a finality to the *Sunfire* case, that judgment has been completely satisfied by payment of the amount awarded, plus interest and costs.

(2)

Neither do the respondents feel that the petitioner is justified in assuming (as it apparently does) that the denials of its motions were predicated wholly upon the technical one-year limitation bar imposed by Rule 60(b). The footnote to page 9 of the Petition for Writ of Certiorari concedes that other frailties of the motion were pointed out by respondents, and some of these were discussed below.

As stated in the opinion of the Circuit Court, "Notwithstanding the voluminous evidence of the 1959 reign of terror in the Kentucky coal fields, and defendant's awareness that it was charged with responsibility therefor, the motions for new trial are silent as to any efforts made or

diligence employed before, during or after the trials to find evidence, if any there was, that others than those connected with defendant were the perpetrators of the violence visited upon the mine owners. Kilburn's secret was kept by one of the defendant's attorneys, who averred that he was commanded to do so by Kentucky's Revised Statutes, § 421.210 (4)." (335 F. 2d 958, 961.)

That the material proffered in support of the motions for new trial would not be competent or admissible is patent on its face. Manifestly the affidavit of an available individual cannot be admitted as evidence upon a trial. Even the affidavit, as noted by the court below, does not appear to be based upon personal knowledge other than in a relatively few instances wherein the affiant identifies himself as a criminal participant (335 F. 2d 958, 959).

According to the petitioner, Kilburn's affidavit was not made for use in any hearing before "the Board of Commissioners of the City of Hazard" where it allegedly appeared (12a).* It was made because "threats" had been made against his life and "he wanted the affidavit made in the event that anything should happen to him that the affidavit could be presented to the grand jury for its consideration" (8a, 11a). Kilburn, therefore, was in little danger of a perjury prosecution when "the fortuitous disclosures of the investigation into the affairs of the Hazard Police Department" brought his affidavit to public radio announcement by some series of events not disclosed. On the other hand, had his affidavit been given by him for the purpose of supporting a motion in the United States District Court, and had that affidavit been false, his posi-

---

* In referring to the certified appendix records mentioned and explained on page 2 of the Petition for Writ, respondents employ the same symbol designation as that employed by petitioner.

tion would have been far less secure, a fact inferentially noted in the court below when it said "It should be observed that Ira Kilburn did not make his affidavit for use as support for defendant's motions, nor is it claimed that he would or could give testimony at a new trial of the 'information' contained in his affidavit" (335 F. 2d 958, 960).

Also of paramount importance is another fact mentioned by the court below:

> "It should be further noted that there is no claim made that any of the plaintiffs in *Sunfire* and *Price*, or any of their agents, or employees, knew of or in any way participated in bringing about the spectacular behavior which Kilburn described. The only occurrence referred to in Kilburn's affidavit which became part of the testimony in either *Sunfire* or *Price* related to the burning of the coal tipple of Marian Ritchie. The latter testified that his tipples at Sassafras, Viper and Ulvah, Kentucky, were burned in July and August, 1959. He was unable to directly identify the arsonists. No fraud upon the court by the plaintiffs is charged or intimated." (335 F. 2d 958, 961.)
>
> * * * * *
>
> "Nowhere in defendant's motions and supporting affidavits is it asserted that any of plaintiffs' witnesses swore falsely, much less that plaintiffs committed fraud on the trial court by suing for injuries of their own doing or by knowingly using false testimony." (335 F. 2d 958, 962.)

Significantly, Kilburn's statement of fear for his life is immediately followed by his identification of George Smith and R. D. Cisco, fellow police officers, as being the persons making the threats (19A, 20A). Petitioner does not even suggest that either of these men had anything to do with the trial of this case, nor were they mentioned throughout either trial.

THE ARGUMENT.

I.

It is asserted that the decisions rendered in the courts below are in conflict with the pronouncements of this Court in *Klapprott vs. United States,* 335 U. S. 601. This same contention was made by this same petitioner in this Court in this same case* as bearing upon the same Question Presented, verbatim. What was said as responsive before seems appropriate again.

In *Klapprott,* the Court was considering a case where a naturalized citizen had been deprived of his citizenship upon a default judgment, rendered without the production of any evidence, and for some four years had been incarcerated and so harassed by governmental authorities as to make it virtually impossible for him to devote any attention to the defense of the denaturalization proceedings, or to seek any relief therefrom. The case arose upon his motion to vacate the default judgment. Among other things, the Government contended that his motion was based upon "excusable neglect," that a motion on such ground fell under subsection (1) of Rule 60(b), and that Klapprott was barred by the one-year limitation stated in Rule 60(b). This Court, however, pointed out that Klapprott's dereliction arose from circumstances which could not be rationally classified as "neglect." On the contrary, the Court pointed out, in substance, that Klapprott's very adversary who had taken a default judgment against him, by other and extraneous tactics of questionable propriety had made it virtually impossible for him to defend himself or to seek earlier relief in the denaturalization case. This was not a case of "neglect," the Court said, but fairly fell within the " 'other reason' clause of 60(b), to which the one-year limitation provision does not apply." (335 U. S. 614.) At the

---

* No. 448, October Term, 1963.

same time, however, the Court made it equally clear that, had the motion been based upon facts encompassed in the term "excusable neglect," the one-year period would have been inflexibly applied. It was said:

> "And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)." (335 U. S. 613.)

Petitioner's incomplete quotation, inferring that the Court had indicated that the above rule should be relaxed whenever "appropriate to accomplish justice" does not convey the Court's true declaration. What the Court said (with our emphasis supplied) was: "In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified,* vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." (335 U. S. 614-615.)

In the petitioner's case No. 448 which was previously before this Court, specific reference was made to *United States vs. Karahalias,* 205 F. 2d 331, and excerpts were quoted therefrom. In the present Petition, the petitioner is content to allude to this opinion only as one of the authorities referred to by the court below. In *Karahalias* Judge Learned Hand first agreed with the petitioner's present contention regarding the availability of subsection (6) "to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2) and (3) do not cover, but those that they do." However, upon a rereading of this Court's opinion in the *Klapprott* case, Judge Hand decided that his original interpretation was entirely in error, and that this Court had declared "that subsection (6) did not toll the limitation of the Rule upon any kind of 'neglect,' whatever the excuse might be."

II.

Again it is here insisted by petitioner, as it was in case No. 448, that the decisions in the lower courts are in conflict with the Sixth Circuit's own decision in *L. M. Leathers' Sons vs. Goldman*, 252 F. 2d 188, and in conflict with a decision of the Second Circuit in *Radack vs. Norwegian American Line Agency, Inc.*, 318 F. 2d 538.

From *Radack* the petitioner deduces that the Second Circuit Court of Appeals has enunciated a principle to the effect that Rule 60 (b) (6) confers such a "grand reservoir of equitable power to do justice in a particular case" that the limitations imposed upon motions under subsection (2) may be overlooked in any instance where the court feels it must do "justice." Respondents do not so interpret this case. In that action suit had been dismissed for lack of prosecution. Some fifteen months later, learning of the dismissal, plaintiffs moved to vacate the order of dismissal. It was contended that the motion fell under subsection (1) of Rule 60 (b), and was therefore barred. However, the court pointed out that, in violation of Rule 77 (d) F. R. C. P., no notice had been given of the entry of the dismissal, and that the practice and rules of the trial court were at variance with the official Rules. The court decided that, since the party had been denied a right specifically conferred by law, a reopening of the case under Rule 60 (b) (6) was proper. To illustrate that the petitioner's interpretation of this opinion cannot be successfully maintained, reference can be made to *Costa vs. Chapkines*, 316 F. 2d 541. That case was in the same court (United States Court of Appeals, Second Circuit), involved the same type of procedure (motion to vacate dismissal of plaintiffs' action for want of prosecution), and was before the same judges. However, it did not involve a failure to give notice under Rule 77 (d) F. R. C. P. In the *Costa* case, appellant's

motion, made more than a year after dismissal of the action, was based upon the allegation that their attorney had been seriously ill and had died. In such a case the court said:

> "Their motion must be read as coming clearly within subdivision (1) of the Rule 60(b), Fed. R. Civ. Pro., providing for relief from judgment in cases of '(M)istake, inadvertence, surprise, or excusable neglect.' As such, the motion made over one year after judgment was untimely. When the grounds for relief fall within subdivisions (1), (2) or (3) of Rule 60(b), the Court is restricted by the one-year limitation and cannot grant relief under subdivision (6) which allows motions to be made within a reasonable time." (316 F 2d 541, 542.)

In the *Leathers* case, the litigant *was not* seeking a new trial on the basis of newly discovered evidence. There had been no trial. A consent decree had been entered pursuant to an agreement between the litigants, and one of the litigants was seeking to set aside that decree because his opponent had failed to perform the opponent's part of the bargain which furnished the consideration for the agreed judgment. The relief was not sought for any of the "reasons" described in sub-parts (1), (2), or (3) of Rule 60(b), and therefore was not subject to the one-year limitation.

III.

In support of its contention that "The Sixth Circuit's majority judgment and opinion are erroneous," the petitioner opens its argument upon the premise that, since the allegations in the Kilburn affidavit were "undenied" the Court must accept, as a proposition of law, that the facts therein related are true. The respondents are aware of no rule of law that requires the Court to "accept" any

such proposition. It must be remembered that Kilburn has not made any affidavit *in support of petitioner's motions* (14A). He is said to have made an affidavit before one of the petitioner's attorneys, allegedly motivated by a fear that his life was in danger, in consequence of which he wished to have information for presentation to a grand jury in the event he should be harmed. This is the substance of the "Noble Affidavit" (10a). It is also said that this affidavit, imparted in such secrecy and confidence, in some unexplained fashion turned up in some proceeding before a city council or board of commissioners, and was publicly announced over the radio. Such is asserted in the "Affidavit of William Perkins" (12a). *For the purpose of supporting petitioner's motions,* no one—not even Kilburn—says that the statements in his affidavit are true. For the purpose of supporting those motions, no one even says that they *think* Kilburn's accusations are true, and this includes the petitioner itself. All the petitioner says is that, *if* Kilburn's statements are true, they are important, and if it can get new trials, it will subpoena Kilburn as a witness "for the purpose of examining him concerning the statements contained" in his affidavit (7a). This form of presentation, in the opinion of respondents, does not obligate the Court to accept as true anything appearing in Kilburn's alleged affidavit.

The remainder of the petitioner's argument is largely predicated upon the dissenting opinion of Circuit Judge Edwards wherein Judge Edwards perceived "the suggestion of a major conspiracy between mine operators and agents of law enforcement" which he thought represented "either malicious perjury or suppressed truth" which constituted a "charge of fraud upon the court." This view was not disregarded nor lightly treated in the appellate Court, for the majority said:

"Because of this language, we have again scrutinized defendant's motions and their supporting affidavits and fail to find therein the basis for such observations. We do not believe that we should gratuitously supply defendant's motions with allegations which counsel quite obviously avoided making. We further observe that even if the allegations of Kilburn's affidavit be accepted as true, they wholly fail to charge that the plaintiffs, or anyone connected with them conspired with, cooperated with, or in any way participated in the conduct described by Kilburn." (335 F. 2d 958, 962.)

Neither, we might add, do the petitioner's motions or supporting affidavits indicate that the plaintiffs or anyone connected with them knew any of the facts related in the Kilburn affidavit (if true) at the time of trial, falsely testified with reference to any of such alleged facts, or participated in the suppression of the alleged facts during the trial.

It is submitted that the Circuit Court's majority accurately and ably evaluated the motions here before the Court in the following language:

"The motions here involved state in their captions that they ask for a new trial 'because of newly discovered evidence,' and in the body of each motion they ask for 'a new trial upon newly discovered evidence.' If, however, the substance of the motions made them something different than the formal label placed on them, defendant should not be denied relief because of such technicality. But the content of the motions and their supporting affidavits disclose that they are nothing more than what their titles proclaim them to be—motions for a new trial on the ground of 'newly discovered evidence.' To get relief under subsection (b) (6) they must assert some 'other' reason, for such section is limited to 'any *other* reason justifying relief * * *' All that defendant's motions seek is

> the opportunity to put Kilburn on the stand at a retrial, or to examine him to discover new evidence to be used on retrial. There is no claim that the *Sunfire* or the *Price* judgments are void or that plaintiffs committed any fraud." (335 F. 2d 958, 962.)

The leading text writers are clearly in accord with this view. In *Moore's Federal Practice,* Volume 7, page 321, it is said:

> "This maximum period of one year is not subject to enlargement by the court; and may not properly be circumvented by a utilization of any of the other clauses, (4), (5), or (6), which are subject only to a reasonable time limitation, where the reason for relief is embraced within clauses (1), (2), or (3)."

Again, in the same volume, page 295, it is made clear that sub-clause (6) should not be used to extend the time limitation applicable to clauses (1), (2) and (3):

> "In reference to the first qualification, the very cast of the Rule and the language of clause (6) indicate that this residual clause is dealing with matter not covered in the preceding five clauses. Further the maximum time limitation of one year that applies to clauses (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3)."

In *Barron & Holtzoff,* Volume 3, Federal Practice and Procedure, page 421, it is said:

> "A motion under clauses (1), (2) or (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable."

CONCLUSION.

The respondents believe themselves entitled to a denial of the Petition for Writ of Certiorari herein presented.

Respectfully submitted,

JAMES S. GREENE, JR.,
Harlan, Kentucky,

LOGAN E. PATTERSON,
Pineville, Kentucky,
Counsel for Respondents.